Supreme Court, U.S.
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No. _____ 982039 JUN 17 1999

In The

Supreme Court of the United States

BETTY ANN GUIDISH,

Petitioner,

v.

JOSEPH D. LEHMAN, GREGORY R. WHITE, PETER A. BALESTREIRE, WILLIAM STICKMAN, R.G. HOLZER, RICHARD A. WATSON, SR., DAVID J. GOOD, DEPUTY FULCOMER, DEPUTY CALLITHEN, JAMES THOMPSON, SCOTT D. MONROE, COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF CORRECTIONS, JOHN DOE, RICHARD ROE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In an action brought under 42 U.S.C. Section 1983, whether due process of law was afforded a public employee when she was suspended from employment without pay, when she was not afforded timely notice of specific charges and evidence against her and a timely and meaningful opportunity to counter the charges in a due process hearing, and when she was deprived of exculpatory evidence crucial to her defense.

2. In an action brought under 42 U.S.C. Section 1983, whether the mere existence of an internal grievance and arbitration procedure precludes a unionized public employee's claim that she was deprived of due process of law when she was terminated from employment, when she was not afforded a meaningful and timely opportunity to counter the charges against her in a due process hearing, and when she was deprived of exculpatory evidence crucial to her defense.

PARTIES

The parties to the proceeding in the court below were: Betty Ann Guidish, Plaintiff, and Joseph D. Lehman, Gregory R. White, Peter A. Balestreire, William Stickman, R.G. Holzer, Richard A. Watson, Sr., David J. Good, Deputy Fulcomer, Deputy Callithen, James Thompson, Scott D. Monroe, and Commonwealth of Pennsylvania Department of Corrections, Defendants.

Following Defendants' motion to dismiss and motion for summary judgment, the district court dismissed all claims against Joseph D. Lehman, R.G.Holzer, Richard A. Watson, Sr., Deputy Fulcomer, Deputy Callithen and Scott D. Monroe. John Doe and Richard Roe were used as names for unknown individuals in the original and amended complaint but they were never identified, and were not parties to the proceedings below. The caption in the court below was not amended to reflect the dismissal of the complaint against the various identified individuals. The respondents in the instant petition are: Gregory R. White, Peter A. Balestreire, William Stickman, David J. Good, and James Thompson.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

OPINIONS OF THE COURTS BELOW 1

JURISDICTIONAL STATEMENT 1

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 15

I. THE DECISION BELOW CONFLICTS WITH PRINCIPLES ESTABLISHED BY THIS COURT.. 15

A. The Decision Below Contravenes This Court's Decisions Regarding The Proof Required To Establish A Claim for Deprivation Of Due Process Of Law 15

B. The Decision Below Would Preclude Any Unionized Public Employee From Ever Suing Individuals Under 42 U.S.C. Section 1983 For Deprivation Of A Property Interest, Merely Because Of The Existence Of A Collective Bargaining Agreement Containing A Grievance and Arbitration Procedure..... 21

II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS CONCERNING DUE PROCESS CLAIMS..... 26

CONCLUSION 27

APPENDIX

Opinion and order of a panel of the United States Court of Appeals for the Third Circuit, dated February 12, 1999, denying Plaintiff's appeal .....App. 1

TABLE OF CONTENTS – Continued

Page

Order of the United States Court of Appeals for the Third Circuit, dated March 19, 1999, denying Plaintiff's petition for rehearing before panel and petition for rehearing before court en banc ..... App. 8

April 29, 1998, judgment of the United States District Court for the Western District of Pennsylvania ..... App. 9

Excerpts from trial transcript, reflecting federal district court's April 28, 1998, grant of Defendants' motion for entry of judgment as a matter of law under Federal Rule of Civil Procedure 50 ..... App. 11

Text of Statute and Constitutional Provision Involved ..... App. 27

TABLE OF AUTHORITIES

Page

CASES:

Adams v. Sewell, 946 F.2d 757 (11th Cir. 1991) 26

Bary v. Barchi, 443 U.S. 55 (1979) 15, 19, 20

Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972) 19

Chaney v. Suburban Bus Division of Regional Transportation Authority, 52 F.3d 623 (7th Cir. 1995) 26

Cleveland Board of Education v. Loudermill, 470 U.S. 532, 105 S.Ct. ___ at 1493 (1995) 15, 18, 19

Cotnoir v. University of Maine Systems, 35 F.3d 6 (1st Cir. 1994) 26

Dykes v. Southeastern Pennsylvania Transportation Authority, 68 F.3d 1564 (3d Cir. 1995) .... *passim*

Gilbert v. Homar, ___ U.S. ___, 117 S.Ct. 1807 (1997) 15

Kremer v. Chemical Construction Corp., 456 U.S. 461, 102 S.Ct. 1883, 72 L.Ed.2d 262 (1982) 18

Matthews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) 18

McDonald v. City of West Branch, Michigan, 466 U.S. 284, 104 S.Ct. 1799, 80 L.Ed.2d 302 (1984) 16

Palmer v. City of Monticello, 31 F.3d 1499 (10th Cir. 1994) 16

Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972) 19

Wingar v. Des Moines Independent Community School District, 20 F.3d 895 (8th Cir. 1994) 26

TABLE OF AUTHORITIES - Continued

Page

CONSTITUTIONAL PROVISION:

Fourteenth Amendment to the Constitution of the United States of America 2

STATUTE:

42 U.S.C. Section 1983 ..... 2, 13, 14, 16, 25

PETITION FOR WRIT OF CERTIORARI

Betty Ann Guidish respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this case on February 12, 1999, and the order entered March 19, 1999, denying Petitioner's petition for rehearing.

OPINIONS OF THE COURTS BELOW

The unreported opinion of the Court of Appeals, dated February 12, 1999, appears in the Appendix at 1-7. The order of the Court of Appeals entered March 19, 1999, and denying Petitioner's petition for rehearing, is set forth in the Appendix at 8. The oral opinion and order of the United States District Court for the Western District of Pennsylvania granting Respondents' Rule 50 motion, was issued April 28, 1998; excerpts from the trial transcript reflecting such opinion and order appear in the Appendix at 11-26; the judgment entered on April 29, 1998, by the district court appears in the Appendix at 9-10; they are not reported.

JURISDICTIONAL STATEMENT

The opinion and order of a panel of the Court of Appeals was issued February 12, 1999. The Court of Appeals denied petitioner's petition for rehearing on March 19, 1999. Judgment of the Court of Appeals was

entered on March 19, 1999. Jurisdiction of this Court is proper under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The constitutional provision involved is the Fourteenth Amendment to the Constitution of the United States of America, which is set forth in the Appendix. The statute involved is 42 U.S.C. Section 1983, the pertinent portions of which are set forth in the Appendix.

STATEMENT OF THE CASE

Statement of the Facts

This case involves the June 7, 1994, suspension without pay of Betty Ann Guidish, an eight-year civilian employee of the Commonwealth of Pennsylvania Department of Corrections, her failure to receive an adequate post-deprivation hearing or remedy concerning such suspension without pay, and her subsequent notification of termination from employment on November 22, 1994. As to the suspension, she had no prior notice of the specific charges and accusations against her, and no meaningful opportunity to defend herself against the serious charges leveled against her. As to the termination, she received an inadequate notice of the specific charges and accusations against her, and no meaningful opportunity to defend herself.

Guidish had worked all of her eight years as a civilian employee in the Correctional Industries Department (CID) of the Department of Corrections, at the State Correctional Institution at Pittsburgh (SCIP), a maximum security prison located in Pittsburgh, Pennsylvania, and her yearly performance appraisals had always been satisfactory or better.[1]

On May 4, 1994, two inmates who had been assigned to work in the CID escaped from the prison. One escapee, Donald Biauce, was captured on May 6, and on May 12 gave an oral statement accusing Petitioner of having assisted in the escape.[2] No physical evidence was found to corroborate any of the details of Biauce's accusations

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[1] On April 13, 1994, Petitioner received an above-average rating on her annual evaluation regarding the performance of her duties as a Stock Clerk 2 in the Correctional Industries Department. (CID). In such rating, she received laudatory comments from her immediate supervisor, CID Manager Richard Watson, Sr., and from Assistant Superintendent David Good.

[2] There were good reasons to doubt Biauce's credibility. He had a particularly violent criminal history, involving several previous escapes or escape attempts, and he was then serving a sentence with 53 and 1/2 to 107 years imprisonment remaining. On May 12, 1994, in exchange for a promise that he receive not one single day of additional prison time for the escape and for crimes committed in furtherance of such escape, Biauce gave an oral statement to Pennsylvania State Trooper Scott Monroe and SCIP Security Captain Stickman. On such date, Biauce for the first time accused Petitioner of having conspired with him and the other inmate, Frazee, to escape from the prison. Biauce's attorney had already told Monroe and Stickman that Biauce wanted to "sell his story to the media". (Appendix in Court of Appeals at 127, 337, 345, 721-24, 860, 868-72, 894, 908-911, 914-16, 1448-50)

about Petitioner's alleged involvement. In an interview on May 12, Petitioner denied those few allegations that were then made known to her.

On June 7, without anything more, Petitioner was suspended without pay for alleged involvement in the escape. At that time, Petitioner had no criminal record of any kind, and had an exemplary work record. Plaintiff's union filed a written grievance on her behalf. SCIP's June 8 response to the grievance was the following:

> "MANAGEMENT ANSWER
>
> "Step #1. Response at First Step: Based upon ongoing investigation on the successful escape of two inmates from this institution, and because of the recent news comments made on television and radio, it was in the best interest of the Grievant as well as the institution to remove the Grievant from disadvantaged working conditions. These circumstances compromise both the employee and security of the institution. *No discipline for just cause has been given and grievance must be denied.*" (Emphasis supplied) (Appendix in Court of Appeals at 1402)

Respondents' initial position was that Petitioner's June 7 suspension without pay was an administrative suspension and was not a "just cause" discipline, and therefore Petitioner's grievance regarding the suspension was not covered by Article 28 of the collective bargaining agreement, and was not grievable. (Appendix in Court of Appeals at 786-87, 813-814, 1317-18, 1549-51, PX9, 1402)

The second escapee, Gerald Frazee, was not captured until June 23, 1994, near Friendsville, Maryland. Frazee did not make a statement until August 15 or 16, while

being transported back to Pennsylvania by Pennsylvania State Trooper Scott Monroe and SCIP Security Captain William Stickman. In the first statement he gave, an oral statement, Frazee's story directly contradicted Biauce's story as to the key facts in the entire case: (a) how the inmates got into the trailer; (b) the circumstances of Plaintiff's alleged involvement, and particularly whether Plaintiff assisted in secreting the escapees in the trailer. Captain Stickman and Trooper Monroe conducted a videotaped interview of escapee Frazee on October 19, 1994, and in such interview, Frazee directly contradicted both his own earlier story of mid-August, and Biauce's oral statement given on May 12, as to these key facts. (Appendix in Court of Appeals at 727, 884-85, 893-94, 896, 904-05, 1042-43, 1093-94, 1358-59)

Thus, rather than the two escapees' telling one consistent story, there were three distinct stories told by the two escapees, as follows:

1. Escapee Biauce told SCIP Security Captain Stickman and Trooper Scott Monroe on May 12, that Biauce, Frazee and Petitioner huddled together near the rear of the trailer in the early morning of May 4, and that Biauce and Frazee jumped in the trailer; after the rear door to the trailer was pulled down, Biauce said he believed that Plaintiff must have latched the door, and installed a new seal over the latch, although he could not see her do so;

2. Escapee Frazee told Captain Stickman and Trooper Monroe on August 15 or 16, that Petitioner accompanied the two inmates to the rear of the trailer, actually climbed up

into the trailer with them, covered each of them up with various materials, and then exited the rear of the trailer, and pulled down the rear door of the trailer; Frazee admitted he did not see Petitioner latch the door, nor install a new seal over the latch;

3. Escapee Frazee then told Captain Stickman and Trooper Monroe during the October 19, 1994, videotape, that Plaintiff was afraid of being seen in the vicinity of the trailer, and so she never got closer than 15-30 yards to the rear of the trailer, never got into the trailer with them, and never covered them up with any materials; moreover, Frazee contradicted his own earlier story by saying that he closed the trailer door, not Plaintiff.

Despite these glaring contradictions, despite there being three contradictory stories rather than one consistent story, and despite statements of other prisoners tending to point the finger at a third person other than Petitioner as Biauce's and Frazee's helper, this exculpatory evidence tending to demolish the escapees' credibility, was not made known to Petitioner. Indeed, the details of these allegations were never made known to Plaintiff until after she filed the instant lawsuit. Moreover, there was a total dearth of physical evidence tending to corroborate a single aspect of the escapees' wild stories, and no witness was ever produced by Respondents corroborating Biauce's or Frazee's stories about Petitioner being in the vicinity of Biauce or Frazee the morning of the escape, or in the vicinity of the trailer any time on the day of the escape. (Appendix in Court of Appeals at 349-50, 876-77, 879, 941-51, 1209-1210. 1445-46)

Following the June 7, 1994, unpaid suspension, Petitioner heard nothing further from SCIP's administration about the allegations against her, until a writing was sent to her on November 8, shortly after her arrest on October 27, 1994.[3] Such writing was sent by SCIP Personnel Director Balestreire, at the request of SCIP Security Captain Stickman (Appendix in Court of Appeals at 1405-1407), and notified Petitioner in very general terms, that she was being accused of having violated various Department of Corrections rules and regulations. (Appendix in Court of Appeals at 1403-1404)

Petitioner received no hearing of any sort until November 15, 1994, over 5 months after the June 7 suspension without pay. The meeting that was held on November 15, with SCIP Security Captain Stickman acting as the "charging officer", was held before Assistant Superintendent David Good, Personnel Director Peter Balestreire, and James Thompson, and was entitled a "Pre-Disciplinary Conference", but it was not a due process hearing.[4] Neither of the two witnesses against

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[3] Petitioner was arrested by Trooper Monroe on October 27, 1994, was placed on $100,000 bond, and spent 7 days in the Allegheny County Jail, on five felony counts, including conspiracy to commit homicide and aiding and abetting an escape. Petitioner was bound over on the criminal charges for subsequent trial in the Court of Common Pleas of Allegheny County, Pennsylvania, following a preliminary hearing held before a District Justice, i.e., a magistrate, on November 17; the only witnesses at such preliminary hearing were the two escapees, i.e., Biauce and Frazee.

[4] Two of the three panel members, i.e., Assistant Superintendent Good and Personnel Director Balestreire, had already denied Petitioner's grievance regarding her June 7 suspension without pay.

Petitioner, i.e., escapee Biauce or escapee Frazee, were present, and she thus was not able to confront them or to cross examine them. Because no written statement had been taken of either of the two escapees, because the October 19 videotape of Frazee was not made known to Petitioner and was not provided to her, and because Captain Stickman's and Trooper Monroe's notes, memoranda and reports of their numerous conversations with these escapees were not produced, Petitioner had no ability to use clearly exculpatory evidence in her defense. Petitioner's union representative repeatedly pressed at such meeting for all statements and evidence in the possession of Captain Stickman or the SCIP administration, but no writings or tapes were then or later produced; the only specifics provided were those stated orally by Captain Stickman at the beginning of the November 15 conference. (Appendix in Court of Appeals at 916, 936-44, 950, 957, 1038-46, 1055-59, 1204-1206, 1292-93, 1332-33, 1340-41, 1408, 1410, 1415, 1429-31, 1432-35, 1441, 1442)

The exculpatory information in the possession of Captain Stickman or made known to him, but not produced to Petitioner, also included statements from prisoners, tending to demolish the escapees' credibility, and this information was not provided to Petitioner until this lawsuit was filed. One inmate told Captain Stickman that escapee Biauce had exhibited bias and ill-will against Petitioner, bragging "I'm going to get that bitch fired". Another inmate told Captain Stickman that another inmate, Joe Kinney, who was escapee Biauce's accomplice in the original crimes for which Biauce was sentenced to so many years of imprisonment, was seen with Frazee and Biauce in the CID the morning of the escape. None of

this information was provided to Petitioner. (Appendix in Court of Appeals at 728-29, 941-51, 1361-65)

Despite the lack of corroborated evidence against Petitioner, despite Petitioner's heated denials of the charges against her, and despite the general rule that a civilian is to be believed over an inmate, the three-member panel, after consultation with SCIP Superintendent White, voted to go along with Security Captain Stickman's recommendation, and to recommend to Superintendent White that Petitioner be terminated from employment.[5]

Aside from the general matters told to Petitioner at the time of her arrest on criminal charges on October 27, 1994, Petitioner was not informed in any way of any of Frazee's specific allegations against her, until the November 15 pre-disciplinary conference. Even then, Captain Stickman did not tell Petitioner or her union representative at such meeting, of the existence of the October 19 videotape of Frazee, and did not provide at such meeting, any exculpatory evidence.

Superintendent White subsequently terminated Petitioner from employment effective November 21, 1994, and notified her of such termination by his letter dated November 22, 1994. (Appendix in Court of Appeals at 1411-1413) Of the various alleged bases for the termination set forth in such letter, there were three apparent

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[5] Captain Stickman admitted in his testimony at trial that in determining whether to believe the testimony of an inmate or the testimony of a civilian employee of the Department of Corrections, the general rule would be that one would believe the civilian employee.

primary reasons. First, Superintendent White relied on the mere fact of criminal charges having been filed against her, and her having been arrested:

> " . . . [W]hile you were on suspension, it has come to the attention of this Administration that on Thursday, October 27, 1994, you were formally charged by the Pennsylvania State Police with one count each of conspiracy to commit homicide, conspiracy and escape . . . " (Appendix in Court of Appeals at 1411)

> " . . . Once Criminal Charges have been filed, as has been the case, it renders an employee from effectively discharging their duties as required in a prison setting" (Appendix in Court of Appeals at 1412)

Second, although Superintendent White was not in attendance at the November 15 pre-disciplinary conference, and received only a short, general written report regarding such conference, and although he knew from such report that neither escapee was present to give testimony against Petitioner at such conference (Appendix in Court of Appeals at 1408-1410), Superintendent White somehow came to believe the following and to rely on the following as a basis for the termination:

> "You did attend this hearing. As a result of the facts introduced into the record at this hearing, it is concluded by corroborated evidence by the two inmates who escaped, that you were implicated in the successful escape. Also, by their corroborated statements, you did enter into an agreement with these two inmates to have bodily harm done on your immediate supervisor and a Corrections Officer posted in

> Correctional Industries. Additionally, by corroborated evidence from these two inmates you did engage in sexual activity with these two inmates independently of each other." (Appendix in Court of Appeals at 1412)

Thus, Superintendent White acknowledged that the only witnesses against Petitioner, i.e., escapees Biauce and Frazee, were not present at the conference, and thus gave no direct evidence to the panel, and were not available for cross-examination by Petitioner.

Third, Superintendent White believed that the widespread media storm that surrounded the escape, the manhunt, and Petitioner's alleged involvement in the escape, was an independent basis for the termination:

> " . . . Due to the adverse publicity this incident has generated over the past several months, you have totally compromised your integrity to continue to be an effective and trusted employee . . . . " (Appendix in Court of Appeals at 1412)

This third reason for the termination from employment, dovetails with the reason given to Petitioner over five months earlier, on June 8, 1994, the day after her June 7 suspension without pay:

> "MANAGEMENT ANSWER
>
> "Step #1. Response at First Step: Based upon ongoing investigation on the successful escape of two inmates from this institution, and *because of the recent news comments made on television and radio, it was in the best interest of the Grievant as well as the institution to remove the Grievant from disadvantaged working conditions.* These circumstances compromise both the employee and

> security of the institution. No discipline for just cause has been given and grievance must be denied." (Emphasis supplied)

With regard to the third reason alone, Petitioner was not apprised by Personnel Director Balestreire in his November 8 notice of pre-disciplinary conference, that she would have to answer charges that somehow the fact of the "adverse publicity" justified her termination. Moreover, when questioned about the specifics of the alleged adverse publicity, none of the decision-makers could recall any details of such publicity, none made any tapes of or otherwise memorialized in writing any of the publicity, and no details were provided to Petitioner. Thus, she had no ability to defend herself at the pre-disciplinary conference.

The criminal charges were ultimately nolle prossed on April 17, 1995 (Appendix in Court of Appeals at 730). Petitioner was not reinstated to employment until June 25, 1995 (Appendix in Court of Appeals at 1062), more than two months after the criminal charges were dismissed, and even then she was not restored to her former position, but instead was relegated to a position in the "outside warehouse". Petitioner did not receive her back pay until October 6, 1995 (PX147, listed and identified in Plaintiff's Pretrial Statement), nearly six months after the criminal charges had been dismissed.

The Proceedings Below

Petitioner filed her initial complaint on June 6, 1996, and her amended complaint on October 25, 1996, the

latter consisting of five counts, consisting of a deprivation of due process claim based on 42 U.S.C. Section 1983, and four other claims. The other claims were ultimately dismissed by the district court either on a Rule 12(b) motion, a motion for summary judgment or a motion at the close of Petitioner's case, for judgment as a matter of law under Rule 50. Petitioner raises in this Petition for Certiorari, only the deprivation of due process claim.

With regard to Petitioner's deprivation of due process claim, a jury trial began in the district court on April 20, 1998, and during the fifth day of trial, Petitioner rested her case. The defendants who then remained in the case, moved under Federal Rule of Civil Procedure 50 for judgment as a matter of law, and the court granted such motion, thus ending the trial. (Appendix at 11-26) In doing so, the district court relied almost exclusively on the Third Circuit decision in *Dykes v. Southeastern Pennsylvania Transportation Authority*, 68 F.3d 1564 (3d Cir., 1995) (Appendix at 19-25), concluding:

> "This Court holds in the present case that the Plaintiff is precluded from further litigating these factual issues if they were decided through the grievance/arbitration procedure or could have been so decided.
>
> "In this case the evidence establishes that Plaintiff had available to her immediately following both her suspension and her termination a multi-step grievance process, which included the right to . . . appeal an adverse decision to a joint area committee comprised of an equal number of union and management representatives, and to arbitration. Plaintiff did grieve her

> employer's actions in suspending and terminating her employment, and her grievances were processed in a prompt manner. However, the Plaintiff and her union did not exhaust this process. . . .
>
> " . . . The procedures which were made available to the Plaintiff were adequate to meet the demands of due process. Although Plaintiff did not pursue her claim through the entire grievance/arbitration process, she cannot decline to pursue a constitutionally adequate procedure made available to her and choose instead to file suit under 1983." (Appendix at 20, 22)

Petitioner filed a timely appeal to the Court of Appeals for the Third Circuit, a panel of which issued a not-for-publication opinion on February 12, 1999. Petitioner filed a petition for rehearing which was denied on March 19 without an opinion. This Petition for Certiorari follows. In its "unreported – not precedential" opinion, the Third Circuit approved of the district court's application of *Dykes*, and disposed of Petitioner's due process claim in one short paragraph, as follows:

> "In Dykes v. Southeastern Pennsylvania Transportation Authority, 68 F.3d 1564, 1571 (3d Cir., 1995), we held that where a party raises a due process claim against a public employer and grievance and arbitration procedures are in place, those procedures satisfy the due process requirement. Once Guidish was suspended and terminated from public employment, she had a multi-step grievance process available to her, which culminated in arbitration. She failed to exhaust that grievance process. Therefore, the District Court correctly determined that she was

not deprived of her right to due process." (Appendix at 5-6)

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH PRINCIPLES ESTABLISHED BY THIS COURT

A. The Decision Below Contravenes This Court's Decisions Regarding The Proof Required To Establish A Claim for Deprivation Of Due Process Of Law

This Court has set forth the factors to be considered in determining whether there has been a deprivation of procedural due process, in *Gilbert v. Homar*, ___ U.S. ___, 117 S.Ct. 1807, 1811-1812 (1997), *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542, 105 S.Ct. ___ at 1493 (1995), and *Bary v. Barchi*, 443 U.S. 55, ___ S.Ct. ___ (1979). The Court of Appeals failed to discuss these and other cases at all, relying exclusively on the court of appeals decision in *Dykes v. Southeastern Pennsylvania Transportation Authority*, and then in a rigid, wooden fashion, without applying the analysis set forth by this Court in *Gilbert v. Homar*.

The district court below did pay lip service to the principles enunciated in *Gilbert v. Homar*, when it stated, "Due process is flexible and calls for such procedural protections as the particular situation demands." (Appendix at 19) The district court correctly stated the following:

> "In order to determine whether a particular procedure meets due process requirements, three factors must be considered: First, the private

> interest that will be affected by the official action. Second, the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards. And finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedure requirement would entail." (Appendix at 21)

The district court, however, then went awry in applying these principles. For example, it assumed that whenever there were grievance and arbitration procedures, " . . . the risk of an erroneous determination is not large and the value of additional or substitute procedures is not great . . . " (Appendix at 21) The district court's factual assumption is at odds with this Court's unanimous decision in *McDonald v. City of West Branch, Michigan*, 466 U.S. 284, 1044 S.Ct. 1799, 80 L.Ed.2d 302 (1984), in which this Court indicated that an arbitrator might not have the necessary expertise to resolve complex Section 1983 issues, and might not have the authority under the collective bargaining agreement to enforce Section 1983 and all its remedies. Petitioner asks this Court to take notice that such remedies would include compensatory damages, punitive damages and declaratory relief,[6] none of which were available under the collective bargaining agreement in the instant case.

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[6] *See e.g., Palmer v. City of Monticello*, 31 F.3d 1499 at 1507-08 (10th Cir. 1994).

In addition, the district court below manifested its apparent indifference to Petitioner's daily, hellish nightmare, by reducing her situation to a mere "lost paycheck and benefits" case. The district court construed Petitioner's property interest very narrowly, reducing the first element of the due process analysis mandated by this Court, i.e., a reasoned and intelligent consideration of the "nature of the private interest affected", to "an employee has a substantial interest in the uninterrupted receipt of her paycheck and benefits." (Appendix at 21) The district court thus belied its apparent indifference to the facts: (a) Petitioner was not working at SCIP from the June 7, 1994, suspension until her June 26, 1995, reinstatement to employment, and was receiving no "paycheck" from SCIP during this time period; (b) there was a delay of over two months from the time in April, 1995, when the criminal charges were dropped, and the date when Petitioner was reinstated to employment; (c) there was a six-month delay from the April, 1995, dismissal of the criminal charges, to October, 1995, in which Petitioner did not receive any of her back pay; (d) Petitioner had been subject to a loss in reputation as a direct result of the media circus, a circus in which SCIP's top management was involved and could have prevented; (e) as testified to by Petitioner and her psychiatrist at the jury trial, Petitioner experienced great emotional distress as a direct and proximate cause of the June 7 suspension without pay and her November 22 termination from employment. All of the above facts supported Petitioner's claims for compensatory and punitive damages, but the district court viewed the nature of the property interest involved, extremely narrowly.

As argued in the court below, the facts in the *Dykes* case were far more simple and easier to decide than the difficult factual issues in this case; moreover, the normal arbitrator probably would not have had to make a decision ever before, in such a highly-charged atmosphere. In the instant case, Petitioner was under suspicion for and ultimately charged with serious felonies such as escape and conspiracy to commit murder, and a specific procedure guiding a fact-finder through a quasi-legal proceeding which would deal with these and other issues, was not contained in the collective bargaining agreement.

The courts below were of the view that the mere existence of a grievance and arbitration procedure is fatal to Petitioner's due process claim. This simplistic view, perhaps based on the federal courts' own problem of docket control amid the huge increase in civil rights litigation, is out of touch with the above-cited decisions of this Court. In *Cleveland Board of Education v. Loudermill*, this Court stated, "An essential principle of due process is that a deprivation of life, liberty or property be preceded by a hearing appropriate to the nature of the case." 470 U.S. at 542. As acknowledged by the court of appeals in *Dykes*, " . . . no single model of procedural fairness, let alone a particular form of procedure, is dictated by the Due Process Clause," citing *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 483, 102 S.Ct. 1883, 1898, 72 L.Ed. 2d 262 (1982), and further, " . . . due process is flexible and calls for such procedural protections as the particular situation demands", citing *Matthews v. Eldridge*, 424 U.S. 319, 334, 96 S.Ct. 893, 902, 47 L.Ed. 2d 18 (1976); *Dykes*, 68 F.3d at 1571.

In determining the types of procedures that would provide due process, the *Loudermill* Court held that due process " . . . requires some kind of a hearing prior to the discharge of an employee who has a constitutionally-protected property interest in his employment." *Id.*, citing *Board of Regents v. Roth*, 408 U.S. 564, 569-70, 92 S.Ct. 2701, 2705, 33 L.Ed. 2d 548 (1972) and *Perry v. Sindermann*, 408 U.S. 593, 599, 92 S.Ct. 2694, 2698, 33 L.Ed. 2d 570 (1972). Specifically, this Court held that a public employee *" . . . is entitled to oral or written notices of the charges against him, an explanation of the employer's evidence . . . and an opportunity to present his side of the story." Loudermill*, 470 U.S. at 546, 105 S.Ct. at 1495. (Emphasis supplied)

The record is clear that in the instant case, Respondents Stickman, Balestreire, Good and Thompson, never honored the repeated and pointed request made of them by Petitioner's union representative during the course of the pre-disciplinary conference held November 15, 1994, for all witness statements, reports and documents of any type regarding the allegations against Petitioner and the investigation of such allegations. Clearly exculpatory materials were withheld from Petitioner, such as the reports of Captain Stickman and Trooper Monroe regarding their questioning of the two escapees, and the October 19, 1994, videotape of escapee Frazee. It stretches one's imagination to believe that an arbitrator would have had the clout to make the recalcitrant prosecutors divulge information that would have been fatal to their case.

In *Bary v. Barchi*, a horse trainer's license was suspended for 15 days after discovery by racing authorities that a horse he had trained had illegal drugs in its system

during a race. There existed a state regulatory scheme which raised a rebuttable presumption that the trainer had either administered the illegal drugs or had been negligent in permitting the horse to be drugged. In that case, this Court held that the central questions were whether the trainer was denied a "meaningful opportunity to be heard," and whether the state provided him a prompt post-suspension hearing "without appreciable delay." 443 U.S. at 66. In the instant case, Petitioner was suspended without pay on June 7, 1994, with no prior pre-suspension hearing. She was not apprised of any charges against her until at the very earliest November 8, 1994, when SCIP Personnel Director Balestreire sent her a memo outlining in the most general terms the alleged offenses, but not advising her of the evidence to be used against her, or the specific nature of the offenses. Only when Petitioner arrived at the pre-disciplinary conference on November 15 was she first apprised of any substantial amount of the specific allegations and alleged evidence that had been and was being used against her. (Appendix in Court of Appeals at 1038-46, 1055-59, 1399, 1401, 1403). This was five months and eight days after the June 7 suspension without pay. The courts below could not reasonably conclude that a delay of such a long period of time – especially when Petitioner had no income – could satisfy this Court's requirement that there be a prompt post-deprivation remedy, that the employee receive a prompt hearing "without appreciable delay."

B. The Decision Below Would Preclude Any Unionized Public Employee From Ever Suing Individuals Under 42 U.S.C. Section 1983 For Deprivation Of A Property Interest, Merely Because Of The Existence Of A Collective Bargaining Agreement Containing A Grievance and Arbitration Procedure

The courts below did not so much as consider the various standards and principles of this Court's many decisions in this field, preferring instead the simplistic and wooden approach based on the Court of Appeals decision in *Dykes*. The facts underlying *Dykes*, however, are far easier than in the instant case, and therefore *Dykes* is distinguishable. In *Dykes*, a bus driver while on duty was asked to submit to a body fluids test to detect the presence of drugs or alcohol in his system. The driver refused to submit to the tests, and was fired for such refusal. His union filed a grievance in accordance with the collective bargaining agreement which it had with the driver's employer, and pursued such grievance through three levels of the grievance and arbitration procedure set forth in the union contract. At each stage of the process, the employer stood firm, determined that the requested tests were based on reasonable suspicion that the driver was substance-impaired while on duty, and upheld the termination. The union failed to take the driver's case to the arbitration step, and the driver sued both his union and his employer.

In *Dykes*, the body fluids test and surrounding procedures, including a determination of whether a reasonable suspicion exists, were specifically and expressly spelled out as terms and conditions of employment. One

provision in the union contract said that "failure to submit to a drug and alcohol test properly required . . . is a dischargeable offense." Moreover, the parties expressly agreed "that the grievance procedures applied to the situation presented here." 68 F.3d at 1567 footnote 4. A court could reasonably conclude that the dispute between the parties drew its essence from the contract, and therefore the mere existence of a facially-neutral grievance and arbitration procedure could reasonably preclude this particular bus driver from pursuing a deprivation of due process claim in federal court.

The court of appeals in *Dykes* pointed out that the plaintiff did not challenge the drug-testing policy as unconstitutional: "What we confront here, then, is not a policy alleged to be unconstitutional; the parties agree that the SEPTA suspicion-based testing policy is reasonable for purposes of the Fourth Amendment." *Id.*, at 1568. Conversely, in the instant case Petitioner has consistently challenged the dearth of fair procedures as being constitutionally defective.

The court of appeals in *Dykes* intimated that drug and alcohol abuse was not uncommon in the transportation industry, and indicated that drug testing was a legitimate way to ferret out those drug or alcohol-impaired employees who hold safety-sensitive positions. It recognized that the issue of whether reasonable suspicion existed was a fairly simple factual matter to determine, and was one issue which the fact-finding procedures normally utilized in the typical union grievance and arbitration procedure could easily handle. The factual disputes and surrounding circumstances in the instant case, however,

are far different from the relatively simple situation in the *Dykes* case.

First, Petitioner was accused of severe felonies – aiding an escape of two dangerous inmates, and plotting for them to murder two co-employees in exchange for her helping them escape; the bus driver in *Dykes* was at most suspected of being a drug or alcohol abuser, and was not accused or suspected of any serious crime. Second, the procedure used to investigate whether Petitioner had aided the inmates to escape and whether she plotted with them to murder two co-employees, was brand new to all those involved in the investigation of the allegations against Petitioner, and in the determination of whether, when and how to discipline Petitioner for such serious alleged offenses.[7] Accusations of serious work-related felonies such as escape and conspiracy to commit murder are not covered in the collective bargaining agreement at SCIP. (Appendix in Court of Appeals at 1470-1485, PX175)

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[7] SCIP Security Captain William Stickman admitted that although he had investigated a few minor escapes known as "walkaways", he had never been involved in the investigation of a breach of the wall, or breach of the perimeter. (Appendix in Court of Appeals at 841, 961)

State Police Trooper Monroe was a young and relatively inexperienced trooper, having spent most of his few years as a state policeman on traffic detail; he had never investigated a crime as serious as this one, and had never investigated an escape. (Appendix in Court of Appeals at 1351)

SCIP Superintendent Gregory White had never been a superintendent until April 18, 1994, when he was promoted to be the Superintendent of SCIP, a maximum-security prison; the escape here took place 16 days later, and a media firestorm ensued.

In *Dykes*, on the other hand, the substance-testing procedure was specifically spelled out in the collective bargaining agreement, and those involved in the investigation would have had substantial familiarity with the procedures pertaining to such testing.

Third, in the instant case, there was a huge amount of publicity starting before the June 7 suspension without pay and continuing long thereafter, where Plaintiff was said by the media to have been involved in the escape of the two inmates.[8] Indeed, some of the media circus was facilitated by Superintendent White's authorization of the issuance of press releases. (Appendix in Court of Appeals at 1414-1415). As pointed out in the Statement of the Facts section of the instant Petition, the media circus was part of the basis used by Superintendent White in his November 22, 1994, letter, to justify the termination of Petitioner:

> " . . . Due to the adverse publicity this incident has generated over the past several months, you have totally compromised your integrity to continue to be an effective and trusted employee . . . . " (Appendix in Court of Appeals at 1412)

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[8] Personnel Director Balestreire admitted that he was aware of news reports (Appendix in Court of Appeals at 1015-1016). Deputy Superintendent Good stated that Superintendent White knew of the media having "implicated" Petitioner in the escape, and he in essence admitted that he had seen the broadcasts on television. Both of such individuals were involved in the first step of the grievance filed regarding the June 7 suspension without pay, and management's answer included as a reason for Petitioner's suspension, " . . . because of the recent news comments made on television and radio." (Appendix in Court of Appeals at 1402)

No such atmosphere surrounded the bus driver or the investigators and fact-finders in *Dykes*.

Finally, there was constant internal pressure within the Department of Corrections concerning the investigation of the causes of the escape. Superintendent White was in regular written and/or oral communication with his superiors in the Department of Corrections' headquarters near Harrisburg, i.e., Deputy Commissioner Fulcomer and his boss, Deputy Commissioner Laurence Reid, throughout the period. Duty Fulcomer paid a visit to SCIP to discuss the status of the investigation. Superintendent White was also in nearly daily communication with either Captain Stickman or his superior, and/or with State Trooper Monroe, throughout the entire period. No such high-pressure situation presented itself in *Dykes*.

The facts in the instant case are compelling. Respondents' behavior was outrageous and reprehensible, especially regarding the failure to have any type of hearing whatsoever after the June 7 suspension without pay for a period of five months and 8 days, and regarding the willful concealment and withholding of clearly exculpatory facts. If a unionized public employee were not under the facts of record in this case allowed to proceed to a jury after satisfying this Court's requirements for a due process claim, then it is hard to imagine any situation where a unionized public employee could ever be entitled to pursue a due process claim based on 42 U.S.C. Section 1983.

II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS CONCERNING DUE PROCESS CLAIMS

In much less extreme factual situations, courts of appeals have held that the mere existence of theoretically fair grievance and arbitration procedures was not sufficient to cure the deprivation of due process that had already occurred. The district court's dismissal of Petitioner's due process claim and the court of appeals' affirmance thereof, represents a split of authority in the circuit courts of appeal regarding the manner used to determine whether an employee received due process, as evidenced in part by cases from the First, Seventh, Eighth and Eleventh circuits: *Adams v. Sewell*, 946 F.2d 757, (11th Cir., 1991) (full evidentiary hearing, not a short conference, is required within a reasonable time after the deprivation), *Chaney v. Suburban Bus Division of Regional Transportation Authority*, 52 F.3d 623 (7th Cir., 1995) (even where there are post-termination procedures that theoretically might sound fair, providing prior notice and a fair opportunity to respond to charges would not pose a significant administrative burden or intolerable delay on the employer), *Wingar v. Des Moines Independent Community School District*, 20 F.3d 895, 900-901 (8th Cir., 1994) (denial of due process where the employee was not afforded the opportunity to cross-examine witnesses or to present witnesses on his behalf), *Cotnoir v. University of Maine Systems*, 35 F.3d 6 (1st Cir., 1994) (post-termination procedures even if fair, will not cure earlier defects in the process, as the harm has already occurred.)

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Third Circuit.

Respectfully submitted,

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Attorney for Petitioner

Dated: June 17, 1999

UNREPORTED – NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-3333

BETTY ANN GUIDISH,

Appellant,

vs.

JOSEPH D. LEHMAN; GREGORY R. WHITE; PETER A. BALESTREIRE; WILLIAM STICKMAN; R. G. HOLZER; RICHARD A. WATSON, SR.; DAVID J. GOOD; DEPUTY FULCOMER; DEPUTY CALLITHEN; JAMES THOMPSON; SCOTT D. MONROE; COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF CORRECTIONS; JOHN DOE; RICHARD ROE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 96-01079)
District Judge: Honorable Alan N. Bloch

Submitted Under Third Circuit LAR 34.1(a)
January 14, 1999

BEFORE: NYGAARD, ALITO and LEWIS,
Circuit Judges.

(Filed FEB 12, 1999)

MEMORANDUM OPINION OF THE COURT

LEWIS, *Circuit Judge.*

Plaintiff-appellant Betty Ann Guidish ("Guidish") brought this action against the Commonwealth of Pennsylvania Department of Corrections ("Department"); its employees Gregory White, Superintendent at the State Correctional Institution at Pittsburgh ("SCIP"); Peter Balestreire, Personnel Officer at SCIP; William Stickman, Captain at SCIP; R.G. Holzer, Major at SCIP; Richard Watson, Manager of the Correctional Institutes Department at SCIP; David Good, Deputy Superintendent for Treatment at SCIP; Thomas Fulcomer, Deputy Commissioner for the Department (collectively "Department Officials"); and Scott Monroe, a Pennsylvania State Trooper. Guidish alleged that Stickman and Monroe caused her to be arrested without probable cause and that she was the victim of malicious prosecution. Guidish also alleged that the Department and Department Officials violated her civil rights by improperly depriving her of employment without due process of law. In addition, she asserted that they violated her rights to equal protection by causing her to be suspended, terminated and prosecuted because of her gender.

I.

The facts of this case are thoroughly set forth in the District Court opinion. *See Guidish v. White*, D.C. Civ. No. 96-1079 (W.D. Pa.). Guidish filed a complaint on June 6, 1996, and an amended complaint on October 25, 1996. The amended complaint contained five counts: three

counts alleging violations under 42 U.S.C § 1983; one count alleging gender discrimination, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*; and a fifth count alleging gender discrimination, in violation of the Pennsylvania Human Relations Act. On November 26, 1996, the Department and Department Officials filed a motion to dismiss, which was granted in part and denied in part.

Discovery was conducted and closed on June 19, 1997. Guidish filed a motion for partial summary judgment on July 3, 1997, and the Department, Department Officials and Monroe filed a motion for summary judgment on July 7, 1997. On August 25, 1997, Guidish filed a motion for leave to amend her amended complaint, which the District Court denied.

On March 16, 1998, the District Court granted in part and denied in part the Department, Department Officials' and Monroe's motions for summary judgment and denied Guidish's motion for partial summary judgment. The court (1) granted summary judgment in favor of individual defendants Holzer, Watson, Monroe, Fulcomer and SCIP Deputy Superintendent Harry Callithen on all counts of the amended complaint; (2) granted summary judgment in favor of Monroe and Stickman with regard to Guidish's malicious prosecution claim; (3) granted summary judgment in favor of all defendants with regard to that portion of Guidish's state law gender discrimination claim that was based on her suspension; and (4) denied Guidish's motion for partial summary judgment.

On April 20, 1998, a jury trial began on: (1) Guidish's procedural due process claims, alleging a violation of her

property rights; (2) that portion of Guidish's claim of equal protection violation based on her termination; and (3) Guidish's Title VII claims against the Department. After Guidish rested her case, on April 28, 1998, the Department and the Department Officials moved under Federal Rule of Civil Procedure 50 for judgment as a matter of law. The District Court granted the motion, ending the trial. For the following reasons, we will affirm the District Court's judgment.

II.

On appeal, Guidish alleges that the District Court abused its discretion when it denied her motion for leave to amend her amended complaint. We review the court's denial of a motion to amend for abuse of discretion. *See Riley v. Taylor*, 62 F.3d 86, 89 (3d Cir. 1995).

Guidish's amended complaint sets forth a cause of action under 42 U.S.C. § 1983 alleging malicious prosecution. She claims that this malicious prosecution resulted in a deprivation of liberty in violation of the due process clause of the Fifth and Fourteenth Amendments to the United State Constitution. In an effort to gain stronger constitutional footing however, Guidish sought to amend her complaint to include allegations of a Fourth Amendment violation. Yet, Guidish made no attempt to seek leave to amend for over ten months. Rather, she sought leave only after the close of discovery and motions for summary judgment were filed, briefed and pending. In light of this undue delay, the District Court did not abuse its discretion in denying Guidish's motion. Moreover, the District Court did not err in refusing to recognize a

substantive right under the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution to be free from criminal prosecution except upon probable cause. In *Albright v. Oliver*, 510 U.S. 266, 271 (1994), the Supreme Court addressed whether a section 1983 malicious prosecution claim alleging a violation of the Fourteenth Amendment substantive right to be "free from criminal prosecution except on probable cause" is cognizable. Chief Justice Rehnquist, writing for the plurality, refused to expand the concept of substantive due process and held that "[w]here a particular amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims.' " *Id.* at 272, 273 (quoting *Graham v. Connor*, 490 U.S. 386, 395, 109 S. Ct. 1865, 1871 (1989)). We agree. Here, the explicit textual source for Guidish's malicious prosecution claim lies in the Fourth Amendment, not substantive due process.

Guidish next argues that the District Court erred when it granted Department Officials' motion under Federal Rule of Civil Procedure 50 for judgment as a matter of law as to her claim alleging deprivation of property without due process of law. We exercise plenary review over a district court's grant of a Rule 50 motion for judgment as a matter of law. *See Watters v. City of Philadelphia*, 55 F.3d 886, 891 (3d Cir. 1995).

In *Dykes v. Southeastern Pennsylvania Transportation Authority*, 68 F.3d 1564, 1571 (3d Cir. 1995), we held that where a party raises a due process claim against a public employer and grievance and arbitration procedures are in

place, those procedures satisfy the due process requirement. Once Guidish was suspended and terminated from public employment, she had a multi-step grievance process available to her, which culminated in arbitration. She failed to exhaust that grievance process. Therefore, the District Court correctly determined that she was not deprived of her right to due process.

Finally, Guidish argues that the District Court erred as a matter of law in granting Department Officials' Rule 50 motion as to her gender discrimination claims. We disagree. As a necessary element of Guidish's gender discrimination claims, she must prove by a preponderance of the evidence that she was terminated from her employment while others not in the protected class and similarly situated were treated more favorably. *See Hankins v. Temple University*, 829 F.2d 437, 440 (3d Cir. 1987). Guidish could not establish this element, as there were no other employees who had been implicated as accomplices to the inmates' escape. In addition, Guidish failed to rebut the Department's proffered non-discriminatory reason, her criminal prosecution arising from the inmates' escape, for its adverse employment action. Since the District Court correctly concluded Guidish failed to present any evidence from which a jury could find those proffered reasons untrue, the court properly granted the Department's motion for judgment as a matter of law.

III.

For the foregoing reasons, we will affirm the District Court's judgment.

TO THE CLERK:

Please file the foregoing opinion.

/s/ Timothy K. Lewis
Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-3333

BETTY ANN GUIDISH,

Appellant

vs.

JOSEPH D. LEHMAN, et al.

SUR PETITION FOR REHEARING

PRESENT: BECKER, *Chief Judge*, SLOVITER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, NYGAARD, ALITO ROTH, LEWIS, McKEE, and RENDELL, *Circuit Judges*.

The petition for rehearing filed by the appellant in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

BY THE COURT,

/s/ Illegible
Circuit Judge

Date: MAR 19 1999

CLC/CC: JHL
JBD
TFH

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

BETTY ANN GUIDISH, Plaintiff, v. GREGORY R. WHITE, PETER A. BALESTREIRE, WILLIAM STICKMAN, DAVID J. GOOD, JAMES THOMPSON, and COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF CORRECTIONS, Defendant.	)	Civil Action NO. 96-1079

JUDGMENT

AND NOW, this 29th day of April, 1998, the Court having granted the Motion for Judgment as a Matter of Law by defendants Gregory R. White, Peter A. Balestreire, William Stickman, David J. Good, James Thompson, and Commonwealth of Pennsylvania Department of Corrections in open Court,

JUDGMENT is hereby entered in favor of defendants Gregory R. White, Peter A. Balestreire, William Stickman, David J. Good, James Thompson, and Commonwealth of Pennsylvania Department of Corrections and against plaintiff Betty Ann Guidish.

/s/ Alan N. Bloch
United States District Judge

cc: James H. Logan, Esquire
3201 Grant Building, Pittsburgh, PA 15219

Thomas F. Halloran, Esquire
Sixth Floor, Manor Complex, 564 Forbes Avenue
Pittsburgh, PA 15219

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* * *

[p. 166] deputy. He can tell you which have been admitted.

We are going to take a recess now because there are some legal matters that I need to discuss with the lawyers. We will take a recess. You can check that out and then I will see counsel in the conference room.

(Recess taken)

(Back on record; proceedings held in conference room)

THE COURT: I have your – you have handed me your memorandum in law in support of a Rule 50 motion, so I take it you want to make a motion.

MR. SCHWEITZER: We would like to move for entry of judgment at this time.

MR. LOGAN: Before we do that. I indicated there was one minor matter out there. I checked the record, and when the videotape of the October 19, 1994, interview of Gerald Frazee was made, the Court Reporter did not take it down. We have a transcript of the original cassette and we would move for admission of that, and it is pre-marked as Plaintiff's Exhibit 70. It was certified by the Court Reporter, Gloria Donovich.

THE COURT: No problem. It's admitted.

MR. LOGAN: Thank you.

MR. SCHWEITZER: We would like to move on behalf of the individual Defendants White, Balestreire, Stickman, Good, and Thompson, and on behalf of the

Pennsylvania Department of [p. 167] Corrections for entry of judgment as a matter of law pursuant to Rule 50. First of all, I think that three of the claims –

THE COURT: Well, I heard the evidence and I really don't need to hear your arguments. I'm ready to rule on it.

When ruling on a motion for judgment as a matter of law, the Court must construe the evidence in the light most favorable to the non-movant and must search the record for the minimum quantum of evidence to support a jury verdict, as set forth in Hughes versus Consol Pennsylvania Coal Company at 945 Fed 2d, 594, Third Circuit decision in 1991, in which certiorari was denied by the Supreme Court at 112 Supreme Court, 2300, 1992.

In this case, Plaintiff has asserted four claims against the Defendants under federal and state law. The court will address each of the Plaintiff's claims in turn.

One, Title 7. With regard to Plaintiff's claim made against Defendant Commonwealth of Pennsylvania, Department of Corrections, under Title 7 of the Civil Rights Act of 1991, Plaintiff contends that she was suspended and terminated from her employment in 1994 because she is a woman.

In order to recover on her claim of sex discrimination under Title 7, the Plaintiff must prove each of the following elements by a preponderance of the evidence:

First, that the Plaintiff is within the protected [p. 168] group of individuals. It is undisputed in this case that the Plaintiff is within the protected group of individuals.

Second, that the Plaintiff was suspended and/or terminated from her position with the Defendant. It is undisputed in this case that the Plaintiff was suspended and terminated from her employment.

And, third, that the Plaintiff's sex was a determinative factor in the Defendant's decision to suspend and/or terminate Plaintiff's employment. This Court finds that Plaintiff has failed to provide sufficient evidence from which a reasonable jury could find that Plaintiff's sex was a determinative factor in the Defendant's decision to suspend or terminate Plaintiff's employment.

The Third Circuit Court of Appeals has held that a verdict of discrimination may be supported by, quote, the evidence that supported the prima facie case, coupled with the jury's determination that the employer's proffered explanations are pretextual. See Sheridan versus E.I. DuPont, 100 Fed 3d, 1061, a 1996 Third Circuit decision.

However, this does not mean that the courts in discrimination cases lose their traditional obligation when faced with a motion for judgment as a matter of law to review the adequacy of the showing presented to the fact-finder. The District Court must determine whether the Plaintiff has cast sufficient doubt upon the employer's proffered reasons to [p. 169] permit a reasonable fact-finder to conclude that the Defendant's proffered reasons are incredible.

Specifically, the Plaintiff must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered-legitimate reasons for its actions that a reasonable fact-finder

could find them unworthy of credence. See Fuentes versus Perskie, 32 Fed 3d, 759, a 1994 Third Circuit decision, which was cited with approval in the Sheridan case.

Plaintiff has failed to present any evidence from which a reasonable jury could find the Defendant's proffered reasons unworthy of credence. There has been no evidence of weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons, nor has there been any evidence of persons outside the protected class receiving more favorable treatment.

In sum, the Court finds the Plaintiff has failed to present sufficient evidence from which a reasonable jury could determine that Plaintiff's sex was a determinative factor in Plaintiff's suspension or termination. Accordingly, the Court grants judgment as a matter of law in favor of Defendant Commonwealth of Pennsylvania, Department of Corrections, with regard to Plaintiff's claim under Title 7.

Second, Pennsylvania Human Relations Act. Plaintiff's second claim is brought against the individual [p. 170] Defendants only – that is, Defendants Gregory R. White, Peter A. Balestreire, William Stickman, David J. Good, and James Thompson – based upon an allegation that these Defendants intentionally discriminated against Plaintiff because of her sex or gender, in violation of state law, by aiding and abetting her employer to suspend and/or terminate her employment because she is a woman. Specifically, Plaintiff contends the individual Defendants violated the provision of the Pennsylvania Human Relations Act which forbids, quote, any person to

aid, abet, incite, compel, or coerce the doing of any act declared by this section to be an unlawful discriminatory practice.

For an individual Defendant to be liable for aiding or abetting an employer's discriminatory conduct, the employer must have engaged in discriminatory conduct. With regard to actions constituting discriminatory conduct by an employer, Pennsylvania law is the same as federal law. See Gomez versus Allegheny Health Services, 71 Fed 3d, 1079, a 1995 Third Circuit case. PHRA violations are construed consistently with interpretations of Title 7. And as already discussed, Plaintiff has failed to provide sufficient evidence from which a reasonable jury could conclude that she was suspended and/or terminated because of her sex.

Further, even if the individual Defendants' liability under the Pennsylvania Human Relations Act was not [p. 171] dependent upon a finding of discrimination by Plaintiff's employer, this Court finds that Plaintiff has failed to provide sufficient evidence from which a reasonable jury could conclude that any of the individual Defendants intended for Plaintiff's employer to discriminate against her because of her sex.

Accordingly, because Plaintiff has failed to present sufficient evidence from which a reasonable jury could conclude any of the individual Defendants violated Plaintiff's rights under state law by aiding or abetting Plaintiff's employer in discriminating against her because of her sex, this Court grants judgment as a matter of law in favor of Defendants with regard to Plaintiff's claims under the Pennsylvania Human Relations Act.

Three, Section 1983, equal protection. Plaintiff's third claim brought pursuant to Title 42 of the United States Code, Section 1983, is also asserted against the individual Defendants only. Specifically, Plaintiff contends that the individual Defendants deprived her of her constitutional right to equal protection when she was suspended without pay and terminated because she is a woman.

In order to establish this claim under Section 1983, Plaintiff must prove each of the following elements as to each Defendant by a preponderance of the evidence:

First, that the Defendant acted under color of state [p. 172] law.

Second, that Plaintiff was deprived of her right to equal protection.

And, third, that the Defendant caused the deprivation of Plaintiff's right to equal protection.

In this case, the Court finds that Plaintiff has failed to set forth sufficient evidence for a reasonable jury to find that she was deprived of her right to equal protection. In order to meet her burden of proving that she was deprived of her right to equal protection, Plaintiff must prove by a preponderance of the evidence that she was subjected to intentional discrimination because of her sex. See Keenan versus City of Philadelphia, 983 Fed 2d, 459, Third Circuit, 1992 decision, citing Andrews versus Philadelphia at 895 Fed 2d, 1469, a 1990 Third Circuit decision.

In other words, Plaintiff must prove that she would not have been suspended and/or terminated if the fact that she is a woman had not been taken into account.

Thus, Plaintiff's claim that she was denied equal protection mirrors her sex discrimination claim made under Title 7. See Gutzwiller versus Fenik, 860, Fed 2d, 1317, a 1988 Sixth Circuit decision. The showing Plaintiff must make to recover on a disparate treatment claim under Title 7 mirrors that which must be made to recover on an equal protection claim under [p. 173] Section 1983.

Because, for the reasons already given, Plaintiff has failed to present sufficient evidence to permit a reasonable jury to find that Plaintiff's sex was a determinative factor in the decision to suspend or terminate her employment, this Court grants judgment as a matter of law in favor of Defendants with regard to Plaintiff's Section 1983 claim based upon an alleged deprivation of her right to equal protection.

Due process. Plaintiff's final claim brought pursuant to Title 42, United States Code, Section 1983, is likewise asserted against the individual Defendants only. Specifically, Plaintiff contends that the individual Defendants deprived her of her constitutional right to due process in connection with her suspension and termination.

In order to establish this claim under Section 1983, Plaintiff must prove each of the following elements as to each Defendant by a preponderance of the evidence:

One, that the Defendant acted under color of state law.

Two, that Plaintiff was deprived of her right to due process.

And, three, that the Defendant caused the deprivation of Plaintiff's right to due process.

In this case, the Court finds, based upon the [p. 174] evidence presented, that as a matter of law Plaintiff was not deprived of her right to due process.

In order to prove that she was deprived of her right to due process, Plaintiff must prove by a preponderance of the evidence the following three factors:

First, that Plaintiff had a property interest in her job with Defendant Commonwealth of Pennsylvania, Department of Corrections. It is undisputed in this case that Plaintiff had a property interest in her job.

Second, that Plaintiff was suspended and/or terminated from her employment. It is undisputed in this case that Plaintiff was suspended and terminated from her employment.

And, third, that Plaintiff was not provided with adequate procedural safeguards relating to her suspension and/or her termination. The Court finds, based upon the evidence, that as a matter of law the Plaintiff was provided with adequate procedural safeguards relating to her suspension and termination.

Where an employee has a protectable property interest in her job, due process normally requires notice and an opportunity to be heard prior to the deprivation of that property interest. See Cleveland Board of Education versus Loudermill, 470 US 532, a 1985 Supreme Court decision.

However, due process, unlike some legal rules, is [175] not a technical conception with a fixed content unrelated to time, place, and circumstances. See Gilbert versus Homar, 117 Supreme Court, 1807, a 1997 decision.

Due process is flexible and calls for such procedural protections as the particular situation demands.

An important Government interest accompanied by a substantial assurance that the deprivation is not baseless or unwarranted may, in limited cases, demand prompt action, thus justify postponing the opportunity to be heard until after the initial deprivation. The Gilbert case I have already cited to you.

In this case, the state had a significant interest in immediately removing the Plaintiff from the work place after she had been accused of assisting with the escape of two inmates. Compare Gilbert at 117 Supreme Court, at 1813, in which it is stated that the state has significant interest in immediately suspending, when felony charges are filed against them, employees who occupy positions of great public trust and high public visibility, such as police officers.

The Third Circuit in Dykes versus Southeastern Pennsylvania Transportation Authority, at 68 Fed 3d, 1564, a 1995 Third Circuit decision, discussed its holding in Bolden versus SEPTA, 953 Fed 2d, 807, a 1991 Third Circuit decision, stating: We noted that unions are given statutory authority to make binding contractual commitments regarding the terms [p. 176] and conditions of employment. Under the Pennsylvania Public Employees Relations Act, a union is the exclusive collective bargaining representative for all of the employees in the unit and, therefore, the union in entering into a collective bargaining agreement may agree to terms and conditions that are contractually binding on all of the employees. We also reviewed case law generated by the Supreme Court

and our sister courts of appeals recognizing that a union's authority as exclusive bargaining agent necessarily entails some restrictions on constitutional rights that individual employees would otherwise enjoy.

The Third Circuit continued: Most importantly, for purposes of reviewing Dykes's claims, we held that certain factual questions may be conclusively determined through collective bargaining, even where resolution of those questions could have important implications under the Fourth Amendment. We also made clear that determination of these factual issues precludes their being litigated further.

This Court holds in the present case that the Plaintiff is precluded from further litigating these factual issues if they were decided through the grievance/arbitration procedure or could have been so decided.

In this case the evidence establishes that the Plaintiff had available to her immediately following both her suspension and her termination a multi-step grievance process, [p. 177] which included the right to an appeal an adverse decision to a joint area committee comprised of an equal number of union and management representatives, as well as possible appeals to the joint Pennsylvania state committee for the CO/PSA unit, also comprised of an equal number of union and management representatives, and to arbitration. Plaintiff did grieve her employer's actions in suspending and terminating her employment, and her grievances were processed in a prompt manner. However, the Plaintiff and her union did not exhaust this process.

A public employer may meet its obligation to provide due process through grievance procedures established in a collective bargaining agreement provided, of course, that those procedures satisfy due process. That is set forth in Dykes, which I have already cited to you, at Page 1571, which quotes Armstrong versus Meyers, 964 Fed 2d, 948, a 1992 Ninth Circuit decision.

In order to determine whether a particular procedure meets due process requirements, three factors must be considered:

First, the private interest that will be affected by the official action.

Second, the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards.

[p. 178] And, finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. See Dykes at Page 1571 and 1572.

With regard to the first factor, it is well established that an employee has a substantial interest in the uninterrupted receipt of her paycheck and benefits.

However, with regard to the remaining two factors, the Third Circuit has recognized that, quote, the risk of an erroneous determination in the grievance/arbitration procedure is not large and the value of additional or substitute procedures is not great. Grievance/arbitration

procedures are a universally accepted method of resolving employment disputes, included in countless collective bargaining agreements. That is in Dykes at Page 1572, quoting Armstrong at Page 950.

The procedures which were made available to the Plaintiff were adequate to meet the demands of due process. Although Plaintiff did not pursue her claim through the entire grievance/arbitration process, she cannot decline to pursue a constitutionally adequate procedure made available to her and choose instead to file suit under 1983.

If the decision not to proceed was made by Plaintiff's union, such decision was made under a duty of fair representation and, as such, the union may be sued for breach [p. 179] of that duty if its conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith. See Dykes at Page 1572.

Significantly, the Third Circuit has held that, quote, where a due process claim is raised against a public employer and grievance and arbitration procedures are in place, those procedures satisfy due process requirements even if the hearing conducted by the employer was inherently biased. See Dykes at Page 1571, quoting Jackson versus Temple University, 721 Fed 2d, 931, a 1983 Third Circuit decision.

The reasons supporting this statement are clear. The right to arbitrate, or in this case to a decision by the joint area committee, provide essentially the same due process safeguards which would have been available through an unbiased hearing. See Dykes at Page 1571. In this case,

there is no evidence suggesting that a proceeding before the joint area committee would have been biased.

Therefore, because the Court finds, based upon the evidence, that as a matter of law Plaintiff was not deprived of her right to due process, the Court grants judgment as a matter of law in favor of the Defendants with regard to Plaintiff's Section 1983 claim based upon an alleged deprivation of her right to due process.

We are going to bring the jury down and we will explain to the jury the rulings that the Court has made.

[p. 180] MR. LOGAN: Your Honor, may the Plaintiff have an opportunity to be heard on this motion?

THE COURT: Sure. I will give you a short period of time, but as I said, I heard the evidence. Go ahead.

MR. LOGAN: I believe the Court's decision on the due process claim is at odds with Gilbert versus Homar. It is a U.S. Supreme Court decision found at 117 Supreme Court at approximately Page 1811 and 12.

And also, Your Honor, in Article 37, Section 1, of the collective bargaining agreement, identified as Plaintiff's Exhibit 175, it says: Where an employee has a right to process a grievance through either the procedure provided herein or through the Pennsylvania Human Relations Commission, or the Equal Employment Opportunity Commission, and the employee files a complaint with either of these commissions and also initiates a grievance by the contract grievance procedure, the parties agree to suspend the processing of the grievance except for grievances involving the discharge or promotion of an

employee for the period during which the complaint is being pursued by the employee. When the commission renders a decision, the employee, or the union where applicable, shall have 15 working days from the day of the commission's decision to notify the employer to reinstitute procedures under the contract grievance procedure.

[p. 181] The Plaintiff in this case, Your Honor, did file a complaint with the PHRC on May 1 and an amended complaint on May 18, 1995. That complaint and amended complaint were cross-filed with the EEOC. Those matters were – issues and notices of right to sue were filed on the basis of that. She filed a complaint under Title 7 regarding that, and also within two years of the events complained as to the due process violation.

In the Homar case, Your Honor, the employee was – and I might add that the governor's code of conduct comes into play here on the notice of November 8, 1994. In this case they cited the governor's code of conduct that provides when a charge of discrimination – I mean, when an employee is charged with a felony, then the employee shall be suspended. That had taken place five months and eight days prior –

THE COURT: And if they violated some term of the contract by not doing that, she had a right to grieve that.

MR. LOGAN: Your Honor, I cannot imagine that this would comport with due process under what the Gilbert versus Homar case said.

THE COURT: It does comport with due process. You have on the joint committee an equal number of union members and management. And the provisions provide if they are deadlocked, you go to an arbitrator. That is due process. And she has to follow that.

[p. 182] Okay. We will go in and explain it to the jury.

(Recess taken)

(Jury present in open court)

THE COURT: I will see counsel at sidebar for a minute.

(On record at sidebar as follows)

THE COURT: I just wanted the record to further say: The claims that were filed with the Equal Employment Opportunity Commission and with the Pennsylvania Human Relations Act had to do with the sex discrimination, and I threw the sex discrimination claims out on the basis of insufficient evidence. It had nothing to do with the – those would be grievances based upon sex discrimination. That would have nothing to do with other grievances that were filed. That's on the record.

(Back on record in open court)

THE COURT: Members of the jury, at the end of the Plaintiff's case, one of the duties of the Court is to look at the evidence and determine if sufficient evidence has been presented, together with looking at the law, to allow the case to proceed and be sent to the jury for determination. That was what I was doing while we excused you and I was meeting with the lawyers. And I

determined that there wasn't sufficient evidence produced to allow this case to go to the jury, and I have dismissed this case as a matter of law.

Constitutional Provision and Statute Involved

The constitutional provision involved is the Fourteenth Amendment to the United States Constitution, Section 1, as follows:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny for any person within its jurisdiction the equal protection of the laws."

The statute involved is 42 U.S.C. § 1983 which provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

Supreme Court, U.S.
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No. 98-2039

In the Supreme Court of the United States

OCTOBER TERM, 1998

BETTY ANN GUIDISH,
Petitioner

v.

JOSEPH D. LEHMAN, GREGORY R. WHITE, PETER A. BALESTREIRE, WILLIAM STICKMAN, R.G. HOLZER, RICHARD A. WATSON, SR., DAVID J. GOOD, DEPUTY FULCOMER, DEPUTY CALLITHEN, JAMES THOMPSON, SCOTT D. MONROE, COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF CORRECTIONS, JOHN DOE, RICHARD ROE,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the suspension and termination of a public employee violates due process where that suspension and termination complied with every factor outlined by this Court in *Gilbert v. Homar*, 520 U.S. 924 (1997); *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532 (1984); and *Mathews v. Eldridge*, 424 U.S. 319 (1976).

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 4

A. Due Process Does Not Require That Suspension from Employment Always Be Proceeded by a Prior Hearing. 4

B. Petitioner's Pre-Termination Hearing Complied with the Principles of Due Process Enunciated by this Court. 5

C. The Existence of Post-Deprivation Grievance Procedures Is a Factor to Be Considered in Evaluating a Due Process Claim. 8

CONCLUSION 13

TABLE OF AUTHORITIES

CASES **PAGE(s)**

Adam v. Sewell,
946 F.2d 757 (11th Cir. 1991) 10

Armstrong v. Meyers,
964 F.2d 948 (9th Cir. 1992) 11

Arnett v. Kennedy,
416 U.S. 134 (1974) 7

Ash v. Bd. of Education of Woodhaven School Dist.,
699 F.2d 822 (6th Cir. 1983) 11

Chaney v. Suburban Bus and Regional Transportation Authority,
52 F.3d 623 (7th Cir. 1995) 10, 11

Cleveland Bd. of Education v. Loudermill,
470 U.S. 532 (1985) ..... *passim*

Contour v. Univ. of Maine Systems,
35 F.3d 6 (1st Cir. 1994) 10

Cushing v. City of Chicago,
3 F.3d 1156 (7th Cir. 1993) 11

Dykes v. SEPTA,
68 F.3d 1564 (1995), *cert. denied*,
517 U.S. 1142 (1996) 8, 9, 10, 11

TABLE OF AUTHORITIES - CONT'D.

CASES — **PAGE(s)**

Gilbert v. Homar,
520 U.S. 924 (1997) ..... i, 3, 4, 5

Graning v. Sherburne County,
172 F.3d 611 (8th Cir. 1999) 11

Jackson v. Temple Univ.,
721 F.2d 931 (3d Cir. 1993) 11

Lewis v. Hillsborough Transit Authority,
726 F.2d 664 (11th Cir. 1983) (*per curiam, cert. denied*, 469 U.S. 822 (1984) 11

Mathews v. Eldridge,
424 U.S. 319 (1976) ..... *passim*

McDonald v. City of West Branch, Michigan,
466 U.S. 284 (1984) 9

Naramanchi v. Bd. of Trustees of Connecticut State Univ.,
850 F.2d 70 (2d Cir. 1988) 11

Winegar v. Des Moines Independent Community School Dist.,
20 F.3d 895 (8th Cir. 1994) 10

STATEMENT OF THE CASE

Petitioner, Betty Ann Guidish, is an employee of the Pennsylvania Department of Corrections ("Department"), an agency of the Commonwealth of Pennsylvania. (Court App. 720).[1] Respondents are Gregory White, Superintendent at the Department's State Correctional Institution at Pittsburgh ("SCI-P"); Peter A. Balestreire, Personnel Officer at SCI-P; William Strickman, Captain at SCI-P; David J. Good, Deputy Superintendent for Treatment at SCI-P; and James Thompson, Inmate Program Manager at SCI-P.[2] (Pet. App. 2-3). Petitioner asserted a violation of due process in connection with a suspension and temporary termination of her employment.

This action arises from the escape from SCI-P of two inmates on May 4, 1994. The first inmate was recaptured on May 6, 1994 and the second on June 23, 1994. (Court App. 62). After they were recaptured, both inmates independently named petitioner as an accomplice to their escape. (*Id.*) On June 7, 1994, petitioner was suspended without pay pending further

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[1]The Court of Appeals Appendix will be referred to as (Court App. ____). The Petitioner's Appendix will be referred to as (Pet. App. _____).

[2]Petitioner also originally named as defendants, the Department; Joseph D. Lehman, Secretary of the Department; R. G. Holzer, Major at SCI-P; Richard A. Watson, Manager of the Correctional Institutes Department at SCI-P; SCI-P Deputy Superintendents Thomas Fulcomer and Harry Callithen; and Scott Monroe, a Pennsylvania State Trooper. Petitioner's due process claim was made only against the individual defendants and the district court dismissed all individual defendants except respondents. Petitioner did not appeal this decision. (Pet. App. 3).

investigation. On October 27, 1994, petitioner was arrested and arraigned on charges of facilitation of a prison escape, criminal solicitation to commit homicide, and criminal conspiracy. (Court App.729). On November 8, 1994, petitioner was notified by mail that a pre-disciplinary conference had been scheduled for Nóvember 15, 1994. That notification advised petitioner of the specific charges pending against her which stemmed from the fact that she had been formally charged with felonies related to her employment. (Court App. 1403-04).

Petitioner appeared at the pre-disciplinary conference with a union representative. At that conference, petitioner was again advised of the charges against her, presented with the Department's evidence against her, and given an opportunity to respond. (Court App.1038-42). On November 22, 1994, the Department by correspondence informed the petitioner that she was terminated due to the criminal charges filed against her which included aiding in the escape of the two inmates. (Court App. 1411-13).[3]

Petitioner had available to her a multi-step grievance process culminating in arbitration. (Court App. 1476-78). Pursuant to that grievance and arbitration process, petitioner was entitled to appeal both her suspension and termination when each occurred and receive a full evidentiary hearing. (Court App.

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[3]One paragraph of the termination letter, quoted only in part by petitioner, stated: "Due to the adverse publicity this incident has generated over the past several months, you have totally compromised your integrity to continue to be an effective and trusted employee. Once criminal charges have been filed, as has been the case, it renders an employee (sic) from effectively discharging their duties as required in a prison setting." (Court App.1412).

1470, 1483-84).[4] Petitioner chose not to exercise her right to such hearings or to arbitration. (Court App. 1251).

On April 12, 1995, petitioner's criminal trial began. On April 17, 1995, the prosecutor *nol. prossed.* all charges. On or about June 15, 1995, it was agreed that petitioner would be reinstated at SCI-P. Petitioner eventually received all lost benefits and back pay minus the amount of money she had received through unemployment compensation.

The district court, applying *Gilbert v. Homar,* 520 U.S. 924 (1997), held that the Department had a significant interest in removing petitioner from the workplace after she had been accused of assisting with the escape of two inmates without a prior hearing. (Pet. App. 18-19). The district court then applied the balancing test enunciated by this Court in *Mathews v. Eldridge*, 424 U.S. 319 (1976) and held that the specific procedures that were made available to petitioner were adequate to meet the demands of due process. (Pet. App. 21-22).

The Court of Appeals held that since petitioner had available to her a multi-step grievance process culminating in arbitration, which she failed to exhaust, the district court correctly determined that she was not deprived of her right to due process. (Pet. App. 6).

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[4]Such hearings are available on a monthly basis. Both the union and management are each entitled to one unilateral monthly postponement. However, all subsequent monthly postponements requires the concurrence of both parties. (Court App. 1478-79, 1482-84).

REASONS FOR DENYING THE WRIT

Petitioner attempts to characterize this case as one in which the court's guidance is necessary to resolve a conflict among the circuits. A conflict concerning what the proper factors are to determine what process is due when a public employee is suspended and terminated. In fact, the court below, in unpublished opinions, correctly applied the proper factors as enunciated by this Court in *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532 (1985) and *Mathews v. Eldridge*, 424 U.S. 319 (1976). Petitioner misconstrues the nature of these holdings and misstates the holdings of other circuits in an attempt to create the illusion of conflict and confusion. There is no conflict or confusion in the Circuits concerning the application of these factors. Though petitioner is unhappy with the results of the application of these factors to the specific facts of this case, petitioner's unhappiness is not a reason for the Court to grant certiorari.

A. Due Process Does Not Require That Suspension from Employment Always Be Proceeded by a Prior Hearing.

Petitioner in her petition for certiorari suggests that the fact that she was suspended with no prior notice or hearing is contrary to the due process principles enunciated by this Court. (Petitioner's Brief, p.2). It is not.

In *Gilbert v. Homar*, 520 U.S. 924 (1997), a police officer was suspended without pay and without the benefit of a prior hearing. *Id.* at 932. This Court ruled that the government in that case had an interest in immediately suspending employees

who occupy positions of public trust and who are accused of committing felonies; that such circumstances justify postponing the opportunity to be heard until after the initial actions are taken. *Id.* at 932-933. In reaching this decision, this Court specifically repudiated the view suggested *in dicta* by *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532 (1985), that pre-deprivation process is always required in the employment context. This Court reaffirmed its position that due process is a flexible concept which requires different procedural safeguards depending on the particular situation involved. *Homar*, 520 U.S. at 930-31.

The district court, applying *Gilbert v. Homar*, held that the Department had a significant interest in removing petitioner from the workplace after she had been accused of assisting with the escape of two inmates without a prior hearing. (Pet. App. 18-19). This holding is not contrary to the principles enunciated by this Court but follows from a direct application of those principles.

B. Petitioner's Pre-Termination Hearing Complied with the Principles of Due Process Enunciated by this Court.

Petitioner asserts that the pre-termination hearing that was provided to her did not comply with the due process principles enunciated by this Court in *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532 (1985). (Petitioner's Brief, p.19). This assertion is both factually and legally incorrect.

In *Loudermill*, this Court held that the essential requirement of due process is that notice and an opportunity to respond be given. *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532, 546 (1985).[5] Specifically, this Court stated that a "public employee is entitled to oral or written notice of the charges against him, an explanation of the *'employer's' evidence* and an opportunity to present his side of the story." *Id.* at 546 (emphasis added).[6]

Petitioner was apprised of the specific charges against her by written notice a week before the pre-termination hearing. *Loudermill* requires "oral or written notice of the 'charges,'" (emphasis added) and that is what petitioner received. *Loudermill* requires that an employee receive an explanation of the *employer's* evidence against her. Petitioner received that explanation when a report outlining the criminal charges pending against her and the allegations made by the two inmates was read at the pre-termination hearing. (Court App. 1038-42, 1405-1410).

Fundamentally, petitioner asserts that at the pre-termination hearing she was entitled to receive a full evidentiary hearing with the right to review every but of evidence obtained throughout the investigation and the right to face and cross

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[5]In *Loudermill*, this Court also made clear that the formality and procedural requirements of a pre-termination hearing can vary depending upon the nature of the subsequent proceedings available to the employee. *Loudermill, supra* at 545.

[6]Petitioner does not dispute that she had an opportunity to present her side of the story at the pretermination hearing. (Petitioner's Brief, p.9).

examine witnesses. (Petitioner's Brief, p.11). This assertion is directly contrary to the specific holding in *Loudermill*:

> In general, "something less" than a full evidentiary hearing is sufficient prior to adverse administrative action. . . . [T]he pre-termination hearing need not definitively resolve the propriety of the discharge. It should be an initial check against mistaken decisions — essentially a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action. . . . To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee.

Id. at 545-546. *See also Arnett v. Kennedy*, 416 U.S. 134, 200 (1974) (cited with approval in *Loudermill*). (The pre-termination hearing is not a full evidentiary hearing held for the purpose of making an ultimate determination of the facts. That is provided through the appeal process. The function of the pre-termination hearing is to make a probable cause determination.)

Petitioner misconstrues the nature of the pre-termination proceedings outlined in *Loudermill*. The courts below applied the principle enunciated in *Loudermill* to determine that petitioner received those proceedings in this action.

C. The Existence of Post-Deprivation Grievance Procedures Is a Factor to Be Considered in Evaluating a Due Process Claim.

This Court in *Mathews v. Eldridge*, 424 U.S. 319 (1976) held that to determine what process is due, three distinct factors are balanced: 1) the private interest that will be affected by the official action; 2) the risk of an erroneous deprivation of such interest through the procedures used and the probable value of any additional or substitute safeguards; and 3) the government's interest. *Id.* at 335.

In this action, the Court of Appeals applied the principles enunciated by this Court using one of its own cases, *Dykes v. SEPTA*, 68 F.3d 1564 (1995), *cert. denied*, 517 U.S. 1142 (1996). *Dykes* involved a public employee who had available to him a multi-step grievance process which culminated in arbitration who chose not to use it. *Id.* at 1571. The Court of Appeals in *Dykes* used the balancing test established in *Mathews v. Eldridge*, and held that in that case the risk of an erroneous determination in the grievance/arbitration procedure was not large; the value of additional or substitute procedures was not great, therefore the grievance/arbitration procedure in place were adequate to the meet the demands of due process. *Id.* at 1572.

Petitioner argues that the Court of Appeals' application of *Dykes*, which itself applied the factors identified by this Court in *Mathews v. Eldridge, supra*, is somehow flawed for not having specifically cited to that case. Petitioner cites no authority for the novel proposition that a court of appeals must cite to Supreme Court case law to properly apply the principles

enunciated by this Court. *Dykes* relied upon those principles and they were properly applied in this action.

Petitioner next argues that *Dykes* conclusion, that where there are grievance and arbitration procedures the risk of erroneous determinations[7] is not large and the value of additional substitute proceedings is not great, is somehow called into question by this Court's decision in *McDonald v. City of West Branch, Michigan*, 466 U.S. 284 (1984). *McDonald* concerned whether the federal full faith and credit statute required that preclusive effect be given to an arbitration award. *Id.* at 288. That case had nothing to do with whether such arbitration procedures satisfy due process requirements.

Petitioner attacks the reasoning of the courts below by misstating it. Suggesting that they held that the mere existence of grievance procedures was fatal to petitioner's due process claim. The district court went through a factually specific analysis of precisely what grievance and arbitration process was available to petitioner in this action. (Pet. App. 20).[8] The district

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[7]The determination which the courts speak of concerns the suspension or termination of employment. Petitioner had available to her post-suspension and termination, the opportunity for full evidentiary hearings, and arbitration procedures to challenge those determinations. The individuals designated under the collective bargaining agreement to judge those hearings and arbitrate any dispute had the authority to reverse any erroneous determinations. Petitioner chose not to avail herself of those procedures.

[8]The Court of Appeals, after reviewing the district court's analysis, did not in its opinion repeat that factual detail. It nevertheless noted that petitioner had available to her a multi-step grievance process that culminated in arbitration. (Pet. App., p.6).

court, citing to *Dykes*, then applied the balancing test enunciated by this Court in *Mathews v. Eldridge*. (Pet. App. 21-22). It was on the basis of this detailed analysis that the trial court concluded that the specific procedures that were made available to petitioner were adequate to meet the demands of due process. *Id.*

Petitioner endeavors to distinguish *Dykes* by pointing to factual differences between that case and this action. Those factual differences do not change *Dykes* legal analysis and conclusion concerning due process. That conclusion simply stated was that the fact that an employee could obtain reinstatement with back pay pursuant to a grievance and arbitration procedure is a legitimate factor to be considered under *Mathews v. Eldridge* and under certain circumstances may preclude a due process claim. *Dykes, supra* at 1571-1572.

Finally, petitioner argues that the Third Circuit Court of Appeals' decision in *Dykes* conflicts with other circuits. It does not. The cases cited by petitioner, supposedly in conflict with *Dykes*, simply reiterate the proper pre-termination procedures under *Loudermill*. *Adam v. Sewell*, 946 F.2d 757, 764-65 (11th Cir. 1991); *Chaney v. Suburban Bus and Regional Transportation Authority*, 52 F.3d 623, 630 (7th Cir. 1995) (where it could not be determined whether pre-termination proceedings had taken place, the case was remanded to the district court for consideration of that issue); *Winegar v. Des Moines Independent Community School Dist.*, 20 F.3d 895, 901 (8th Cir. 1994) (appropriate pre-termination procedures were followed where employee was informed of charges against him and given the opportunity to present his side of the story, but post-termination procedures were not followed where the employee was never given the opportunity to have a full evidentiary hearing); and *Contour v. Univ. of Maine Systems*, 35 F.3d 6, 12 (1st Cir. 1994) (pre-termination, "the employee is

entitled to notice, an explanation of the employer's evidence, and opportunity to present his side of the story"; the absence of these procedures constitutes a violation of due process).

None of these cases in any way contradict or conflict with the Third Circuit Court of Appeals' holding in *Dykes*. In fact, in *Chaney*, the court stated "we have held, and other circuits have agreed 'that grievance procedures created by collective bargaining agreements can satisfy the requirements of due process.'" (*Citing,* among other cases, *Armstrong v. Meyers*, 964 F.2d 948 (9th Cir. 1992); and *Jackson v. Temple Univ.*, 721 F.2d 931, 933 (3d Cir. 1993); two cases relied upon in *Dykes*). *Chaney, supra* at 628.

Petitioner does not cite to a single case which holds that the existence of post-deprivation grievance procedures is not a legitimate factor to be considered under *Mathews v. Eldridge* and traditional principles of due process. Those circuits that have considered the issue are in accord with *Dykes*. *Graning v. Sherburne County,* 172 F.3d 611 (8th Cir. 1999); *Chaney, supra* at 628; *Cushing v. City of Chicago*, 3 F.3d 1156 (7th Cir. 1993); *Armstrong v. Meyers*, 964 F.2d 948 (9th Cir. 1992); *Naramanchi v. Bd. of Trustees of Connecticut State Univ.*, 850 F.2d 70 (2d Cir. 1988); *Lewis v. Hillsborough Transit Authority*, 726 F.2d 664 (11th Cir. 1983) (*per curiam, cert. denied*, 469 U.S. 822 (1984)); *Ash v. Bd. of Education of Woodhaven School Dist.*, 699 F.2d 822 (6th Cir. 1983).

In the present action, the courts below applied *Cleveland Bd. of Education v. Loudermill* and *Mathews v. Eldridge* and determined that the requirements of due process had been met under the specific facts of this case. Petitioner is clearly unhappy with the result of the application of these factually specific factors to this action; however, the courts below in applying

these factors followed the principles enunciated by this Court which are not in conflict or confusion.

CONCLUSION

For these reasons, respondents respectfully request that the Court deny the petition for writ of certiorari.

Respectfully submitted,

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